Supreme Court of the United States.

Nos. 44 and 45.—October Term, 1903.

44 J. L. Howard, alias Frank Thompson; A. L. Daly, alias Gonez Bono, and H. D. Hawley, Appellants, *vs.* Captain J. M. Fleming, Warden of State's Prison of North Carolina. — Appeal from the Circuit Court of the United States for the Eastern District of North Carolina.

45 J. L. Howard, alias Frank Thompson; A. L. Daly, alias Gonez Bono, and H. D. Hawley, Plaintiffs in Error, *vs.* The State of North Carolina. — In error to the Supreme Court of the State of North Carolina.

[November 16, 1903.]

At the June term, 1901, of the Superior Court of Guilford County, North Carolina, the three parties named as appellants in the first of these cases and as plaintiffs in error in the second were indicted, tried and convicted of the crime of conspiracy. Daly was sentenced to the penitentiary for seven years and the other two for ten years each. All appealed to the Supreme Court of the State, by which court the judgment was affirmed, (129 North Carolina, 584,) and thereupon the writ of error in the last case was issued. A writ of *habeas corpus* was also sued out from the Circuit Court of the United States for the Eastern District of North Carolina, directed to the warden of the State prison, which, after hearing, was dismissed, and from such dismissal an appeal was taken to this court; and that is the first of the above cases.

Mr. Justice Brewer delivered the opinion of the Court.

Although these are separate cases, coming from different courts, we shall consider them together, for the same proceedings are challenged in each.

We premise that the trial was had in a State court, and therefore our range of inquiry is not so broad as it would be if it had been in one of the courts of the United States. The highest court of the State has affirmed the validity of the proceedings in that trial, and we may not interfere with its judgment unless some right guaranteed by the Federal Constitution was denied and the proper steps taken to preserve for our consideration the question of that denial.

The first contention demanding notice is that the indictment charged no crime. As found it contained three counts, but the two latter were

abandoned, and therefore the inquiry is limited to the sufficiency of the first. That charged a conspiracy to defraud. There is in North Carolina no statute defining or punishing such a crime, but the Supreme Court held that it was a common law offense, and as such cognizable in the courts of the State. In other words, the Supreme Court decided that a conspiracy to defraud was a crime punishable under the laws of the State, and that the indictment sufficiently charged the offense. Whether there be such an offense is not a Federal question, and the decision of the Supreme Court is conclusive upon the matter. Neither are we at liberty to inquire whether the indictment sufficiently charged the offense. (*Caldwell* v. *Texas*, 137 U. S. 692, 698; *Davis* v. *Texas*, 139 U. S. 651, 652; *Bergemann* v. *Baker*, 157 U. S. 655.)

Again, it is contended that the defendants were denied the equal protection of the laws, in that the sentence was more severe than ever before inflicted in North Carolina for a like offense, and was cruel and unusual; in that two were given ten years and the third only seven years' imprisonment, and also in that they were sentenced to imprisonment in the penitentiary instead of to hard labor on the public roads. No case of a similar offense is cited from the judicial reports of North Carolina, and the Supreme Court in its opinion refers to the crime as "a fashion of swindling, which has doubtless been little practiced in this State." That for other offenses, which may be considered by most, if not all, of a more grievous character, less punishments have been inflicted does not make this sentence cruel. Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one. Swindling by means of a pretended gold brick is no trifling crime, and a conspiracy to defraud by such means does not commend itself to sympathy or leniency. But it is unnecessary to attempt to lay down any rule for determining exactly what is necessary to render a punishment cruel and unusual or under what circumstances this court will interfere with the decision of a State court in respect thereto. It is enough to refer to *In re Kemmler*, (136 U. S. 436,) in which these questions were discussed, and to say that a sentence of ten years for an offense of the nature disclosed by the testimony, especially after it has been sustained by the Supreme Court of a State, does not seem to us deserving to be called cruel. If the effect of this sentence is to induce like criminals to avoid its territory, North Carolina is to be congratulated, not condemned. Doubtless there were sufficient reasons for giving to one of the conspirators a less term than the others. At any rate, there is no such inequality as will justify us in setting aside the judgment against the two.

So far as respects the sentence of the defendants to the penitentiary instead of to work on the public roads, section 4, chap. 355, p. 631, Laws N. C. 1887, in terms warrants it, for that provides that when the judge presiding

is satisfied that there is good reason to fear an attempt to release or injure any person convicted of any of the offenses, for which sentences to work on the public roads may be imposed, it shall be lawful for him to sentence to imprisonment in the penitentiary. It is true there is no recital of any such reason to fear, but we cannot hold in the face of the decision of the Supreme Court of the State that the omission of such recital invalidates the judgment.

Again, it is said that there was not due process, because the trial judge refused to instruct the jury on the presumption of innocence. He did charge that the guilt of the accused must be shown beyond a reasonable doubt, and that on a failure in this respect it was the duty to acquit. He also explained what is meant by the term "reasonable doubt." The Supreme Court sustained the charge. Of course, that is a decision of the highest court of the State that in a criminal trial it is sufficient to charge correctly in reference to a reasonable doubt and that an omission to refer to any presumption of innocence does not invalidate the proceedings. In the face of this ruling as to the law of the State, the omission in a State trial of any reference to the presumption of innocence cannot be regarded as a denial of due process of law.

These are the principal matters presented by counsel. Some of them were argued elaborately both in brief and orally; especially that in reference to the absence of any statute providing for the punishment of conspiracy, and the alleged absence of any common law offense of that nature. We have not deemed it necessary to review the various authorities, or enter upon any discussion of the matter, because we are of opinion that the decision of the Supreme Court of the State in reference thereto is conclusive upon us.

It does not appear that the Federal character of the questions was presented to the Supreme Court of the State, although in the opinions of the Supreme Court the questions themselves were fully discussed. But in the absence of any claim to protection under the Federal Constitution, we are compelled to hold that we have no jurisdiction in the case coming from the Supreme Court of the State, and the writ of error will be

Dismissed.

The same questions were presented in the *habeas corpus* case, and as that comes to us from a Federal court we have jurisdiction, and in that case the judgment will be

Affirmed.

The motions in respect to change of custody of the defendants will, in view of the conclusion on the merits of the cases, be denied.

Mr. Justice HARLAN concurs in the result.